1992

The Richards Irrigation Co. v. Ves A. Karren, Rock Products Co., Integon Indemnity Corporation : Reply Brief

Utah Court of Appeals

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UTAH
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IN THE UTAH COURT OF APPEALS

THE RICHARDS IRRIGATION CO., a Utah corporation, Plaintiff, vs. VES A. KARREN dba ROCK PRODUCTS CO., and INTEGON INDEMNITY CORPORATION, a foreign corporation, Defendants. --- VES A. KARREN dba ROCK PRODUCTS COMPANY, Defendant, Third-Party Plaintiff and Appellant, vs. THE RICHARDS IRRIGATION CO., a Utah corporation also known as RICHARDS IRRIGATION CO., DIVISION OF WATER RESOURCES FOR THE STATE OF UTAH, a division or agency of the State of Utah, PETER T. LIN, W. JAMES PALMER, Third-Party Defendants and Appellees.	Court of Appeals No. 920407-CA Priority No. 15 Third District Court Case No. C-87-2390

APPELLANT'S REPLY BRIEF

APPEAL FROM A 12(b)(6) DISMISSAL OF A THIRD-PARTY COMPLAINT BY THE THIRD DISTRICT COURT, SALT LAKE COUNTY, THE HONORABLE JUDGE YOUNG

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DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Constitution, Article XII, § 19 (1993 as amended).

> **Blacklisting Forbidden.** Each person in Utah is free to obtain and enjoy employment whenever possible, and a person or corporation, or their agent, servant, or employee may not maliciously interfere with any person from obtaining employment or enjoying employment already obtained from any other person or corporation.
>
> **Public Policy.** It is hereby declared to be the public policy of the State of Utah that the right of persons to work, whether in private employment or for the state . . . shall not be denied or abridged on account of membership or nonmembership in a labor union, labor organization or any other type of association; and further, that the right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion.

Utah Code Ann. § 34-34-4:

> **Agreement, understanding or practice denying right to work declared illegal.** Any express or implied agreement, understanding or practice between employer and any labor union, labor organization or any other type of association, whereby any person not a member of such union, organization or any other type of association shall be denied the right to work for an employer, or whereby membership in such labor union, labor organization or any other type of association shall be denied the right to work for an employer, or whereby membership in such labor union, labor organization or any other type of association is made a condition of employment or continuation of employment by such employer, or whereby any such union, organization or any other type of association acquires an employment monopoly in any enterprise or industry, is hereby declared to be an illegal combination or conspiracy and against public policy.

Utah Code Ann. § 34-34-5:

> **Any agreement, understanding or practice designed to violate chapter declared illegal.** Any express or implied agreement, understanding or practice which is designed to cause or

require, or has the effect of causing or requiring, any employer or labor union, labor organization or any other type of association, whether or not a party thereto, to violate any provision of this chapter is hereby declared an illegal agreement, understanding, or practice and contrary to public policy.

Rule 12(b), Utah Rules of Civil Procedure:

(b) **How presented.** Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

ARGUMENT

POINT I

THE STATE DEFENDANTS' MOTION TO DISMISS WAS AND SHOULD BE CONSIDERED AS A MOTION TO DISMISS, NOT AS A MOTION FOR SUMMARY JUDGMENT.

A footnote on page 6 of the State Defendants' Brief contains a cursory statement that the State Defendants' Motion to Dismiss was really a Motion for Summary Judgment. However, they are mistaken for the following reasons:

A. The Parties Did Not Treat the Motion as a Summary Judgment Motion.

The State Defendants' motion was entitled "The State's Motion to Dismiss Rock Products' Amended Third-Party Complaint," not "Motion for Summary Judgment," and it was filed pursuant to Rule 12(b)(6), not Rule 56 of the Utah Rules of Civil Procedure. No affidavits of any kind were submitted by the parties to provide additional evidence, nor did the trial court invite any. The oral argument transcript on the motion certainly reflects that the parties viewed the motion only as a motion to dismiss. Counsel for Rock Product's emphasized the difference between State Defendants' Motion to Dismiss and a motion for summary judgment when he stated:

> We are entitled to proceed with our cause of action, to have reasonable opportunities of discovery, to find out more about the details in this case so that we can flush out our

> various causes of action and then if some of them are not totally, legally sufficient, then to go through the motion for summary judgment once we have got to a stage that's appropriate in the handling of the lawsuit.

(R. 2557.)

The definite implication of this statement is that Rock Products believed the motion to be what it was presented by the State Defendants to be: a motion to dismiss pursuant to Rule 12(b)(6). The following oral argument statement by State Defendants' counsel indicates they too viewed and treated the motion only as a motion for summary judgment:

> [Rock Products has] made a big deal here in argument as well as in their brief about Rule 8 of [the Utah Rules of Civil Procedure]. Well, I'd like to -- we mentioned this in our brief and I think it bears repeating again. What Rule 8(a) says, Rule 8 requires that the -- requires "that the pleading shall contain a short and plain statement of the claims showing that the pleader is entitled to relief." **I mean, he can allege anything but if it doesn't state a cause of action you cannot stay in court on it. That's why we have motions to dismiss.** That's why there are rules on that. And you know, I might be able to quarrel with the clarity of their pleadings but I don't need to. **Regardless of how clear their pleadings are they have not stated a cause of action on any of these counts.**

(R. 2567) (emphasis added).

B. The Trial Court Treated the Motion as a Motion to Dismiss.

A trial court has not treated a motion to dismiss as a motion for summary judgment where no factual findings are made or relied upon. *Colman v. Utah State Land Bd.*, 795 P.2d 622, 625 (Utah 1990). Like the trial court in *Colman*, the trial court in the present action only entered conclusions of law in granting State Defendants' motion to dismiss.

At no time did the did the trial court state that it was treating the motion as one for summary judgment. The trial court's order refers to the hearing on the "Motion to Dismiss," the order grants the State Defendants' "Motion to Dismiss," and the order contains no findings of fact to suggest it was a summary judgment ruling. (R. 773-776.) In addition, the order reflects that the trial court "finds and holds that as a matter of law Rock Products' Amended Third-Part Complaint fails to state a claim upon which relief may be granted against the State Defendants." (R. 774.) The trial court's order states that its finding was made after considering only "the pleadings, the memoranda and cases submitted, and the arguments of counsel." (R. 774.)

Despite this, the State Defendants argue in this appeal that the court somehow silently converted the motion to one for summary judgment by considering "materials outside of the

pleadings." (Brief of State Defendants, p. 6, n. 1.) The State Defendants do not state what those materials might be or to what extent and for what purpose they were supposedly considered by the trial court.

In addition to the complaint and answer, the only documents filed with the trial court concerning the motion were supporting memoranda with one appendix to a memorandum, a contract. Attaching a contract as an appendix to a memorandum and incorporating it by reference does not raise the State Defendants' memorandum and attachment above the level of argument. Furthermore, there is no indication that the trial court considered any "materials outside of the pleadings." Even if the appendixed contract was viewed by the trial court as a submission of material outside the pleadings, there is no basis to assert that the trial court's ruling was based on anything other than the pleadings. *Homart Development Co. v. W.T. Sigman*, 868 F.2d 1556, 1561-62 (11th Cir. 1989).

As a general matter, a trial court's review of argument contained in motions and memoranda does not warrant conversion of a motion to dismiss to one for summary judgment. *See, Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991) (construing Rule 12(b)(6) of the Federal Rules of Civil Procedure). The trial court in this case did not treat the motion to dismiss as a

motion for summary judgment as State Defendants' suggest.

C. A Trial Court Cannot, on its Own, Convert a Motion to Dismiss to a Motion for Summary Judgment.

"[A] trial court cannot on its own motion convert a rule 12 motion to dismiss to a Rule 56 motion for summary judgment." *Colman v. Utah State Land Bd.*, 795 P.2d 622, 625 (Utah 1990), citing *Hill v. Grand Central, Inc.*, 477 P.2d 150, 151 (Utah 1970). In *Hill v. Grand Central, Inc.*, 477 P.2d 150 (Utah 1970), the Utah Supreme Court held that a trial court cannot convert a motion to dismiss into a motion for summary judgment on its own initiative:

> [the trial court] has no more right to ask the plaintiff how he will establish his claim than [the court] has to require the defendant to state what its defense will be. It would have been highly improper for the court, on the motion to dismiss, to have given the defendant thirty days to present proof as to the truth of the alleged statement or as to the lack of malice.

Id. at 151. Since the parties did not treat the motion to dismiss as a motion for summary judgment, this Court should find that the trial court could not have done so on its own accord.

D. The State Defendants Cannot Convert Their Motion to a Motion for Summary Judgment on Appeal.

The position taken by the State Defendants that the motion was one for summary judgment is raised by them for the first time on appeal. However, it is too late for them to do so. The Utah

Supreme Court in *Colman, supra,* stated that, if a trial court cannot convert a motion to dismiss to a summary judgment on its own, a party cannot do so on appeal. 795 P.2d at 625.

E. Even if the Trial Court Did Convert the Motion to a Motion for Summary Judgment, Such Conversion Pertains to Only One Cause of Action and is Reversible Error.

The State Defendants do not specify what materials outside of the pleadings were included in their motion. As noted above, the State Defendants presumably refer to the appendix to their memorandum in support of their motion to dismiss, which is the contract between the Board of Water Resources and the Richards Irrigation Company. Certainly that document has no bearing on any cause of action other than Rock Products' cause of action for breach of a third-party beneficiary contract. Therefore, the motion could not be treated as a motion to dismiss on non-contract claims.

Even though the contract was argued by both parties in the motion, the contract attached as the appendix did not contradict the allegations of Rock Products' claim, and it therefore did not provide any basis to convert the motion to dismiss to a motion for summary judgment. *See Watters v. Pelican Int'l., Inc.*, 706 F. Supp. 1452, 1457, n.1 (D. Colo. 1989). Accordingly, the motion to dismiss could not be properly treated as one for summary judgment as to any cause of action.

Even if the trial court, without informing the parties, treated the motion as one for summary judgment, it committed reversible error in doing so. Trial courts are urged to use caution before converting a motion to dismiss to a summary judgment motion. The Utah Supreme Court has stated "it is generally not well advised to treat a motion to dismiss as one for summary judgment." *Salt Lake County v. Salt Lake City*, 570 P.2d 119, 122 (Utah 1977). There was no justification in this case to convert the motion to dismiss to a summary judgment motion.

In addition, a proper conversion requires more than what occurred in this case. In *Jackson v. Integra Inc.*, 952 F.2d 1260 (10th Cir. 1991) the Tenth Circuit Court of Appeals held that, where the trial court relied upon an exhibit provided by a defendant, the motion to dismiss should have been treated as a motion for summary judgment and it was reversible error (1) to not inform the plaintiff that the motion would be treated as a motion for summary judgment and (2) to not give the plaintiff the opportunity to gather evidence to demonstrate the existence of a material fact. *Id.* at 1261. *See, also, Miller v. Glanz*, 948 F.2d 1562, 1566 (10th Cir. 1991). If, as the State Defendants suggest, the trial court did treat all or a portion of the motion as a motion for summary judgment, its order must be reversed

because it did not properly convert the motion to a motion for summary judgment by informing the parties of its intended treatment and affording Rock Products the requisite notice and opportunity to present evidence of material facts.

At oral argument on the State Defendants' motion to dismiss, counsel for Rock Products argued the impropriety of the State Defendants' factual argument when at issue was only the sufficiency of the pleadings. (R. 2555-2557; 2564-2565.) Rock Products reiterated that no discovery had taken place and no affidavits had been submitted in support of the State Defendants' motion. (R. 2555.) Rock Products also argued that in order to accept the arguments of the State Defendants, the trial court had to assume facts that were not supported by evidence. (R. 2556.) The trial court's failure to give Rock Products any reasonable opportunity to present material to address the intent of the contracting parties to benefit Rock Products was improper.

F. The Trial Court Erred by Ruling on the Intent of the Contracting Parties.

In order for the trial court to determine the intent of the contracting parties (R. 774), it must consider the terms of the contract **as well as the surrounding facts and circumstances.** *Ron Case Roofing & Asphalt Paving, Inc. v. Blomquist*, 773 P.2d 1382 (Utah 1989). The trial court's determination of intent went well beyond the scope of a Rule 12(b)6 motion addressing the

sufficiency of pleadings. More importantly, the trial court had absolutely no evidence before it regarding the surrounding facts and circumstances. A contract appended to a memorandum provides no information whatsoever regarding the facts and circumstances surrounding it.

Even if the trial court did treat the memoranda as "evidence," the memoranda of the parties raise a material dispute of fact regarding the intent of the parties. The oral argument of Rock Products' counsel illustrates this point as well as the point raised in the preceding paragraph:

> We have alleged, in any event, that Rock Products is a third-party beneficiary. Now the strange think about this whole analysis is I think the state and us agree. The test in that circumstance as to whether or not there's a third-party beneficiary is whether or not the contract between the two main parties, that is the state and Richards in this case, was **intended** to benefit Rock.
>
> Well, we've alleged that there was clearly intent to harm. The question is whether there was intent to benefit. **Your honor, I don't know how in the world you can make that determination until we have had a least some opportunity to engage in some discovery. They say there's no intent; we say there is intent. They haven't even got a defense anywhere that contests it. They say the intent governs; we say intent is to benefit Rock Products. That's it. Now we're entitled to get involved in our discovery to verify that. So it seems to me we are in basic agreement on that whole [point] except they are engaging in some factual semantics**

that there wasn't any intent and they have nothing to back it up.

(R. 2564-65.) (Emphasis added.) Thus, even applying the standards of a motion for summary judgment, the pleadings raised material issues of fact, and the trial court erred when it did not consider all facts and all inferences fairly arising from those facts in a light most favorable to Rock Products. *Young v. Texas Co.*, 331 P.2d 1099 (Utah 1958).

If treated as a motion to dismiss, the trial court's ruling was also improper. As set forth in Appellant's Brief, allegations in the complaint must be considered as true and in the light most favorable to Rock Products. As noted in *Colman v. Utah State Land Bd.*, 795 P.2d 622 (Utah 1990), a dismissal is a severe measure and can be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be presented in support of the claim." *See also Anderson v. Dean Witter Reynolds, Inc.*, 841 P.2d 742 (Utah App. 1992). "[I]f there is any doubt about whether a claim should be dismissed for the lack of a factual basis, the issue should be resolved in favor of giving the party a opportunity to present its proof." *Colman* at 624, citing *Baur v. Pacific Fin. Corp.*, 383 P.2d 397, 397 (Utah 1963).

POINT II

UTAH CODE ANN. § 68-3-3 GOVERNS RETROACTIVITY OF THE GOVERNMENTAL IMMUNITY ACT AMENDMENTS.

The State Defendants argue that a 1987 amendment to the Governmental Immunity Act must be applied retroactively based solely on the reasoning of *Frank v. State*, 613 P.2d 517 (Utah 1980). However, State Defendants fail to address *Rocky Mountain Thrift Stores v. Salt Lake City Corp.*, 784 P.2d 459 (Utah 1989). In that case, the Utah Supreme Court refused to retroactively apply an amendment to the Governmental Immunity Act which provided that the management of flood waters is considered to be a governmental function. The Court noted that Utah Code Ann. § 68-3-3 mandates that "no part of these revised statutes is retroactive, unless expressly so declared." *Id.* at 461. It concluded that the amendment did not fall within the exception to this rule which permits the retroactive application of statutory amendments "'when the purpose of an amendment is to clarify the meaning of an earlier enactment' or [the amendment] is merely an 'amplification as to how the law should have been understood prior to its enactment' . . . ." *Id.* at 461-462 (citations omitted).

The 1987 amendment at issue expanded the definition of "governmental function" by defining everything a governmental entity does as a "governmental function." *Provo City Corp. v.*

State, 795 P.2d 1120, 1123 (Utah 1990) (the 1987 amendment expanded the definition of "governmental function" by defining everything a governmental entity does as a 'governmental function.') The amendment is a substantive change from the laws that existed when Rock Products' causes of action arose. Because it would provide the State Defendants with a greater degree of immunity, it must not be applied retroactively. *Rocky Mountain Thrift* at 462. If an amendment stating that flood control activities fall within the meaning of governmental function was not to be applied retroactively to protect prior governmental action, a sweeping amendment defining governmental function and overturning a long history of judicial construction should not be applied retroactively to protect a variety of prior governmental actions.[1]

POINT III

WHETHER THE STATE DEFENDANTS' ACTS CONSTITUTE DISCRETIONARY FUNCTIONS ARE QUESTIONS OF FACT.

The application of the pre-1987 Governmental Immunity Act Provision to determine whether the acts Rock Products complained of were discretionary will require the benefit of a

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[1]The reason the Utah Supreme Court retroactively applied a Governmental Immunity Act amendment in *Frank*, 613 P.2d at 519, may be that the Court viewed the amendment as one of the exceptions to the rule prohibiting retroactive application of statutes. In the event this Court deems the *Rocky Mountain Thrift Stores* and *Frank* cases to be in conflict, the most recent case should control.

factual record. *Hansen v. Salt Lake County*, 794 P.2d 838, 846 (Utah 1990). As is illustrated by the State Defendants' factual arguments in their appeal brief, pp. 16-21, the application of the pre-1987 discretionary function standard to Rock Products' numerous causes of action raise issues of fact.

The Standiford/Johnson discretionary function test "does not refer to 'what government *may* do, but what government alone *must* do' and includes 'activities not unique in themselves . . . but essential to the performance of those activities that are uniquely governmental.'" *Bennett v. Bow Valley Dev. Corp.*, 797 P.2d 419, 421 (Utah 1990), citing *Rocky Mountain Thrift Stores v. Salt Lake City Corp.*, 784 P.2d 459, 462 (Utah 1989) (citation omitted; emphasis in original). To apply the discretionary function test to the State Defendants' conduct, significant discovery must take place before it can be determined if State Defendants' conduct falls within a "must do" category. Thus, because it is premature to make such a determination, the trial court improperly dismissed Rock Products' claims against the State Defendants for failure to state sufficient claims.

POINT IV

THE CONSTITUTIONAL MANDATE PROTECTING FREEDOM TO OBTAIN EMPLOYMENT IN ARTICLE XII, § 19 OF THE UTAH CONSTITUTION IS SELF-EXECUTING.

In part, Article XII, § 19 of the Utah Constitution states, "every person in this state shall be free to obtain employment whenever possible . . . ." Rock Products asserts that this clause of the provision is self-executing. Self-executing constitutional clauses may be divisible from clauses which are not self-executing. In *Springville Banking Co. v. Burton*, 349 P.2d 157 (Utah 1960), Justice Wade, in dissent[2] notes the following quote from the Supreme Court of South Carolina:

> It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the Legislature to render such provision nugatory by refusing to pass laws to carry them into effect; **and where the matter with which a given Section of the Constitution is divisible, one clause thereof may be self-executing and another clause or clauses may not be self-executing.** Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect and no ancillary legislation is necessary to the enjoyment of a right given and the enforcement of a duty imposed.

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[2]This dissenting opinion is cited with approval by the Utah Supreme Court in *Colman v. Utah State Land Bd.*, 795 P.2d 622, 632 (Utah 1990), in support of its reversal of the majority opinion in *Springville Banking*, 349 P.2d at 159, and other Utah Supreme Court opinions, in reaching the conclusion that Article I, Section 22 of the Utah Constitution is self-executing.

Id. at 161, citing *Schick Springs Water Co. v. State Highway Dep't*, 157 S.E. 842, 847-48 (S.E. 1931) (emphasis added). Rock Products asserts that the first phrase of § 19 is divisible from the rest of the provision because it states a clear, constitutionally protected right to be free to obtain employment. The Utah Supreme Court has recognized that the freedom to work embodied in § 19 is "one of the basic freedoms vouched safe by our state constitution . . . [which] complements makes more meaningful the other rights guaranteed as part of our constitutional liberties." *State v. Packard*, 250 P.2d 561, 563 (Utah 1952). The constitutional right to be free to obtain employment is "mandatory and obligatory as it is" and needs no legislation to be enforced. *See Colman*, *supra* at 635. Therefore, article XII, § 19 of the Utah Constitution affords a constitutionally protected right upon which Rock Products bases, and has sufficiently pleaded, a valid cause of action.

Although the legislature has provided criminal enforcement for violations of § 19 (Utah Code Ann. § 34-24-1 *et seq.*), nowhere has the legislature limited enforcement of § 19 to criminal enforcement. As Rock Products has argued in its appeal brief, criminal enforcement statutes do not limit or bar any right which may be pursued in a civil action (R. 1006-07.)

State Defendants' reference to the recent revision to § 19 does not alter the foregoing conclusion. An amendment eliminating the requirement that an action be raised to the level of a crime while leaving the remainder of the constitutional provision intact does nothing to eliminate civil remedies available for violation of that constitutional provision.

POINT V

ROCK PRODUCTS HAS STATED A VALID CIVIL RIGHTS CAUSE OF ACTION.

A. State Defendants Misstate the Standard Rock Products must Meet to Establish a § 1983 Claim.

State Defendants mischaracterize the standard Rock Products must meet to sufficiently state a civil rights claim under Rule 12. State Defendants argue that for Rock Products to state a claim, it "must be able to show as a matter of law that the State 'deliberately deprived [Karen] of his constitutional rights.'"[3] All that is required for Rock Products to state a cause of action under 42 U.S.C.A. § 1983 is to allege that the State Defendants, acting under the color of state law, deprived Rock Products of rights secured by the United States

[3]The case cited by the State defendants in support of this assertion is a curious choice. *Wade v. Haynes* concerns a violation of the Eighth Amendment to the United States Constitution by a corrections officer who attacked a prison inmate. The standard cited is a standard of proof at trial. Even the cases cited with approval by the court in *Wade* do not address motions to dismiss, but analyze motions for summary judgment, supported by affidavits and other evidence. *Schaal v. Rowe*, 460 F. Supp. 155, 157 (E.D. Ill. 1978); *Little v. Walker*, 552 F.2d 193, 197 n. 8 (7th Cir. 1977).

Constitution. *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986). Rock Products has sufficiently pleaded a civil rights cause of action in its Fifteenth Cause of Action. (R. 522-524.)

B. Rock Products Has Been Deprived of Property Interests by the State's Action Without Due Process of Law as Prohibited by § 1983 of the United States Code.

Rock Products Was Deprived of Property Interests.

In general, Rock Products has alleged that it has been deprived of property interests without due process of law in violation of the Fourteenth Amendment to the United States Constitution. (R. 522.) Rock Products property interests are derived from rights secured by state law. The Utah Supreme Court has noted that the United States Supreme Court recognizes valid property interests which are derived from a variety of sources: "'[P]roperty,' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Celebrity Club Inc. v. Utah Liquor Control Comm'n*, 657 P.2d 1292, 1297 (Utah 1982), citing *Perry v. Sindermann*, 408 U.S. 593, 601 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972).

Contrary to the State Defendants' argument, Rock Products' civil rights claim is based on much more than concepts of breach of contract. As noted above, Rock Products ability to

freely obtain gainful employment, and to be free from blacklisting, is secured by Article XII, § 19 of the Utah Constitution and rises above the concept of mere contract rights. *See*, *Local 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987), *cert denied*, 486 U.S. 1055 (1988) ("The Utah blacklisting laws arguably confer 'nonnegotiable state-law rights on . . . employees independent of any right established by contract.").

The underlying policy consideration of the "Utah Right to Work Law" is also applicable to this case. That law states the public policy of Utah to be that "The exercise of the right to work must be protected and maintained free from undue restraints and coercion." Utah Code Ann. § 34-34-2.

By virtue of the Constitution of the State of Utah and its statutory laws, Rock Product's right to seek gainful employment free from coercion by blacklisting rises to the level of a property right within the broad range of interests constituting property.

As alleged in the Complaint, Rock Products had also been requested by Hadfield Irrigation Company to perform approximately $52,000 worth of work for Hadfield on a state project to be undertaken by Hadfield. (R. 503.) When the State Defendants prohibited Rock Products from performing this work, it

deprived Rock Products of $52,000. Under any definition, money constitutes property.

The further conspiracy on the part of the State Defendants to defraud Rock Products of $34,000 worth of sand also constituted a taking or appropriation of a property interest. (R. 512-13.)

C. The Action of the State Defendants Constituted a Deprivation of Property Interests Without Due Process in Violation of § 1983.

It is self evident that State employees acting under color of state law to deprive Rock Products of property through outright fraud does not meet any standard of "due process." Further, State employees acting under color of state law to deprive Rock Products of its right to gainful employment and of the benefit of its contractual dealings with Hadfield by blacklisting--a process in violation of the constitution and criminal statutes of the State of Utah--not meet any standard of "due process." Rock Products' claims with respect to interference with the Hadfield contract are analogous to the failure-to-hire context of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-3(a). In those cases, generally, an employee is protected from discrimination simply for participating in legal proceedings. *See Ruggles v. California Polytechnic State Univ.*, 797 F.2d 782, 784 (9th Cir. 1986). Similarly, Rock Products

asserts it has the right to be protected from retaliation, in the form of blacklisting, simply for exercising its legal right to enforce and/or to litigate disputes arising under The Richard Irrigation Co. (R. 503.)

Consequently, the State Defendants, acting under color of state law, deprived Rock Products of rights and privileges secured by the United States Constitution and violated § 1983 of the United States Code.

CONCLUSION

As demonstrated by the foregoing arguments, the Court should reverse the trial court's Order and Judgment in its entirety and deny the State Defendants' Motion to Dismiss.

Respectfully submitted this 14th day of May, 1993.

RICHARDS, BRANDT, MILLER
& NELSON

DAVID L. BARCLAY
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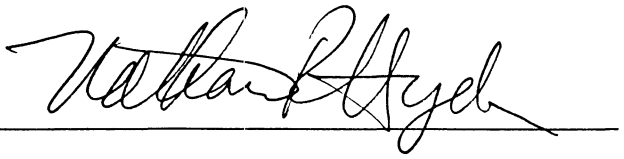
Attorneys for Rock Products

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that two true and correct copies of the foregoing instrument were hand delivered on this 14th day of May, 1993, to:

Jan Graham, Esq.
Utah Attorney General
Brent A. Burnett, Esq.
Assistant Attorney General
330 South 300 East
Salt Lake City, UT 84111
Attorneys for Appellees



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